Supreme Court, U. S.
FILED
APR 6 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1976

No. [redacted] 76-1096

JERRY LANGELLA,

Petitioner,

against

COMMISSIONER OF CORRECTIONS,
STATE OF NEW YORK,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

ROBERT M. MORGENTHAU
District Attorney
New York County
Attorney for Respondent
155 Leonard Street
New York, New York 10013
(212) 732-7300

PETER L. ZIMROTH
HENRY J. STEINGLASS
Assistant District Attorneys
Of Counsel

TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Statement of the Case	2
Langella's Motion to Quash His Grand Jury Subpoena	2
Langella's Appearance in the Grand Jury	3
Contempt Charges	4
The State Appellate Proceedings	6
Proceedings in the Federal District Court	7
The Appeal to the Second Circuit	9
Subsequent Proceedings	13
Argument	16
I—The Court should not consider petitioner's claim relating to what is required by federal law when a witness in a state grand jury proceeding objects to questioning as based on illegal eavesdropping. This claim was not briefed below. Also, petitioner did not object to the questions which became the subject of his indictment for contempt	17
II—Petitioner's Fifth Amendment claim should not be considered because he gave no substantial testimony which could have been "used" by the grand jury to indict him	21
III—Langella's claims should not be considered because he pleaded guilty in state court	23
Conclusion	25

TABLE OF AUTHORITIES

PAGE

Cases:

Blackledge v. Perry, 417 U.S. 21 (1974) 24
Burns, Matter of, 50 A.D.2d 527 (1st Dept. 1975) 18
Berry, In re, 521 F.2d 179 (10th Cir.), *cert. denied*, 423 U.S. 928 (1975) 18

Cameron v. United States, 231 U.S. 710 (1914) 21

Gelbard v. United States, 408 U.S. 41 (1972) ..2, 5, 8, 9, 11, 18
Glickstein v. United States, 222 U.S. 139 (1911) 21
Grand Jury (Freedman), In re, 529 F.2d 543 (3rd Cir. 1976) 18

Kastigar v. United States, 406 U.S. 441 (1972) 21

Langella v. Supreme Court, 76 Civ. 5415 14
Lefkowitz v. Newsome, 420 U.S. 283 (1975) 23, 24
Lochiatto, In re, 497 F.2d 803 (1st Cir. 1974) 18

Menna v. New York, 423 U.S. 61 (1975) 24
Millow, In re, 529 F. 2d 770 (2d Cir. 1976) 18
Mintzer, In re, 511 F.2d 471 (1st Cir. 1975) 19

People v. Einhorn, 35 N.Y.2d 948 (1974) 6, 7, 11, 12, 18
Persico, In re, 491 F.2d 1156 (2d Cir.), *cert. denied*, 419 U.S. 924 (1974) 9

Santiago, In re, 533 F.2d 727 (1st Cir. 1976) 18

Tollett v. Henderson, 411 U.S. 258 (1973) 23

United States v. Bryan, 339 U.S. 323 (1950) 21

Westerberg v. District Court, 506 P.2d 746 (1973), *cert. denied*, 414 U.S. 1162 (1974) 18

PAGE

Other Authorities:

Federal Rules of Appellate Procedure: (Rule 41(b) 14, 15

New York Criminal Procedure Law:
Section 50.10 3
Section 190.35 3
Section 190.40 ..... 3, 22
Section 190.45 3
Section 440.10(2)(a) 14
Section 440.10(2)(c) 14
Section 710.70(2) 24

New York Penal Law, Section 215.51 4

18 U.S.C. Section 3504(a)(1) 18

18 U.S.C. Section 6002 21

28 U.S.C. Section 2515 ..... 8, 9

IN THE

Supreme Court of the United States

October Term, 1976

No. 76-1076

JERRY LANGELLA,

Petitioner,

against

COMMISSIONER OF CORRECTIONS, STATE OF NEW YORK,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

Preliminary Statement

Jerry Langella, having pleaded guilty in state court to contempt charges for refusing to answer questions before a grand jury, seeks a writ of certiorari to review an order of the United States Court of Appeals for the Second

Circuit (SMITH, OAKES and MESKILL, JJ.), entered November 22, 1976. The Second Circuit unanimously affirmed a judgment of the United States District Court for the Southern District of New York (BRIEANT, J.), entered May 12, 1976, denying Langella's petition for a writ of habeas corpus.

Statement of the Case

Langella's Motion to Quash His Grand Jury Subpoena

Langella was subpoenaed to appear before a New York County grand jury investigating the murder of Joseph Gallo in a Manhattan restaurant on April 7, 1972. Langella moved to quash the subpoena. Langella contended that under *Gelbard* v. *United States,* 408 U.S. 41 (1972), he was entitled, prior to appearing in the grand jury, to a preliminary hearing to determine the lawfulness of electronic surveillance which might be used to question him (A19*).

The motion was heard on December 19, 1972. The prosecutor stated that he had informed Langella's attorney that electronic surveillance used in the investigation had been pursuant to court order (A22). Langella then asked the court to examine the court order, supporting affidavit and tapes to determine whether all surveillance was pursuant to a legitimate order and whether sealing and "all the proctocol" had been properly performed (A25-26, 27). The court (SANDIFER, J.) queried whether Langella had a right to challenge the legality of questioning before any questions had been asked (A19, 21), and concluded that Langella was not entitled to the hearing he had requested (A33-35). The motion to quash the subpoena was denied, and Langella was directed to appear before the grand jury (A35).

* References preceded by "A" are to Petitioner's Appendix in the Second Circuit.

Langella's Appearance in the Grand Jury

Later that same day, December 19, 1972, Langella appeared before the grand jury. New York's provision for "automatic" "transactional" immunity* was explained to him, but he did not respond to questioning and repeatedly asked to consult with his attorney (24a-48a**). After sev-

* N.Y. CPL Sec. 190.40 provides:

> 1. Every witness in a grand jury proceeding must give any evidence legally requested of him regardless of any protest or belief on his part that it may tend to incriminate him.
>
> 2. A witness who gives evidence in a grand jury proceeding receives immunity unless:
>
> (a) He has effectively waived such immunity pursuant to section 190.45; or
>
> (b) Such evidence is not responsive to any inquiry and is gratuitously given or volunteered by the witness with knowledge that it is not responsive.
>
> (c) * * *

N.Y. CPL Sec. 50.10 provides:

The following definitions are applicable to this article:

> 1. "Immunity." A person who has been a witness in a legal proceeding, and who cannot, except as otherwise provided in this subdivision, be convicted of any offense or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he gave evidence therein, possesses "immunity" from any such conviction, penalty or forfeiture. A person who possesses such immunity may nevertheless be convicted of perjury as a result of having given false testimony in such legal proceeding, and may be convicted of or adjudged in contempt as a result of having contumaciously refused to give evidence therein.

The definition in CPL 50.10 applies to CPL 190.40 (see CPL. Sec. 190.35).

** References followed by "a" are to pages of the Appendix to the Petition for a Writ of Certiorari.

eral consultations with his attorney (27a, 32a, 49a), Langella answered some of the questions puto to him (33a, 34a, 49a). He denied involvement in the killing of Gallo. However, Langella refused to answer two questions: first, whether he had visited a certain apartment in Nyack, New York, in April 1972, and second, whether he had spoken with one Joseph Luparelli in that apartment (49a-51a).*

There ensued a lengthy colloquy between Langella and the questioner (51a-65a) and then still another consultation between Langella and his attorney (66a). Thereafter, the question whether Langella had been receiving messages from Joseph Gorgone about the murder of Gallo, which had been asked earlier but not responded to, was repeated. Langella then asked, "Is that question about Joseph Galgone [sic] based on electronic surveillance or wiretaps or bugs?" (66a). Langella said that his lawyer told him that "we should go before the judge" (66a, 67a, 68a). "As of Joseph Galgone [sic], he [my lawyer] wanted to know whether you have any wiretap, illegal device" (69a). Langella was excused without answering the question whether he had received messages from Gorgone (69a-70a).

Contempt Charge:

On January 16, 1973, Langella was indicted in state Supreme Court, New York County, for criminal contempt (N.Y. Penal Law §215.51) for his categorical refusal to answer two questions: whether he had visited the Nyack apartment in April 1972 and whether he had spoken to Luparelli in the apartment. None of the charges were based

* According to the indictment later returned, other evidence received by the grand jury indicated that one of Gallo's killers had been hiding in that apartment. Indictment No. 238/73 (A10).

in any way on Langella's refusal to answer the question whether he had been receiving messages from Joseph Gorgone—the only question to which Langella had raised an objection based on illegal wiretapping.

After his indictment, Langella moved for pretrial discovery of applications, orders and transcripts for any electronic surveillance "in order to determine whether the defendant's refusal to answer questions asked of him before the grand jury was lawful and proper under *Gelbard* * * *" (Afft. of Nancy Rosner, Esq., March 7, 1973, p. 2). He received a transcript of an intercepted conversation and a court order authorizing the interception (Petition, p. 9). However, Langella did not move to suppress any evidence. Nor did he make any motion to dismiss the indictment, or any other pretrial motion, claiming that his questioning in the grand jury was in fact based upon illegal electronic surveillance.

Instead, Langella moved to dismiss the indictment on four other grounds:

(1) Langella claimed that, at the time of his grand jury appearance, he had the right to refuse to answer questions until there was a prosecutorial certification, and a judicial determination, that questions were not based upon illegal electronic surveillance. This claim was rejected on the ground that "the district attorney ha[d] already answered the crucial question as to electronic surveillance before the witness in open court prior to the appearance before the grand jury * * *" (A14).

(2) Langella claimed that his privilege against self-incrimination was violated because the indictment was returned by the same grand jury which had heard him testify. This claim was also rejected (A15).

(3) Langella claimed that his Sixth Amendment right to counsel had been violated because he was not permitted to consult with counsel during his grand jury appearance. This claim was rejected without discussion.

(4) Finally, Langella claimed that he had not been advised by the questioner concerning the scope of immunity in other jurisdictions. This claim was also rejected without discussion.*

On June 18, 1975, Langella pleaded guilty to the indictment. On July 24, 1975, he was sentenced to a term of five months' imprisonment.

The State Appellate Proceedings

On appeal to the Appellate Division, First Department, Langella presented only the first three of the claims he had made in his pretrial motion.

In support of his first claim, Langella relied heavily upon the decision of the New York Court of Appeals in *People* v. *Einhorn,* 35 N.Y. 2d 948 (1974), in which it was stated:

> The request during the grand jury proceeding by the witness that he be brought before the court must be respected and once there the presiding justice may

* The opinion by Justice George Roberts denying the pretrial motion is reproduced at A12-15.

> make appropriate inquiry whether the witness' objection is sound. In the course of that inquiry, the court, may in its discretion interrogate the prosecutor under oath, either *in camera,* or in open court, whether or not the basis for the questioning of the witness was founded on the illegally obtained wiretap evidence. 35 N.Y. 2d at 949-950.

In response to the first claim, the State pointed out that Langella was not arguing on appeal that the questions he refused to answer were in fact based on illegal electronic surveillance. Rather his claim was procedural—that at time of his grand jury appearance he was denied a judicial ruling on whether questions were based on illegal electronic surveillance. The State maintained that Langella was not entitled to a judicial ruling under *Einhorn.* His request for such a ruling on a motion to quash his grand jury subpoena was premature because he had not yet appeared in the grand jury and been asked specific questions. When Langella did appear in the grand jury and was asked the questions which became the subject of his contempt indictment, he made no objection that those questions were based upon illegal electronic surveillance. Nor did he ask for a judicial ruling with respect to those questions. Instead, he categorically refused to answer.

The state also answered on the merits the other two claims raised on appeal. In addition, however, the state argued that none of Langella's three claims could be reviewed on appeal after his guilty plea.

On March 4, 1976, Langella's conviction was affirmed by the Appellate Division without opinion. Leave to appeal to the New York Court of Appeals was denied on April 13, 1976.

Proceedings in the Federal District Court

On April 20, 1976—the day he was scheduled to surrender in state Supreme Court to begin serving his sentence—Langella commenced the instant habeas corpus proceeding in the United States District Court for the Southern District of New York, seeking to vacate his conviction. In his habeas petition, Langella presented the same three claims he had raised on appeal in the state court.* *Ex parte,* Langella obtained from the District Court a stay of his surrender to state authorities.

On the return date, April 23, 1976, in order to expedite consideration of the petition, it was agreed that the matter would be submitted upon the briefs filed in the Appellate Division. There being no disputed factual questions, an evidentiary hearing was unnecessary. The District Court continued the stay of Langella's surrender pending a ruling on the petition.

On May 12, 1976, the District Court denied the petition. The Court declined to view Langella's plea of guilty as a bar to review (14a-15a), but rejected Langella's three claims on their merits. With respect to Langella's first claim (concerning the procedures followed at the time of his grand jury appearance), the Court stated:

* The three claims Langella presented to the District Court and to the Appellate Division were identical since Langella "annexed to this habeas corpus petition and made a part of hereof as if fully set forth herein" his Brief and Appendix in the Appellate Division. Petition for Writ of Habeas Corpus, paragraph 6 (footnote omitted). The petition itself merely made passing reference in paragraph 6(i) to 28 U.S.C. Sec. 2515, *Gelbard* v. *United States, supra,* and the Fourth and Fifth Amendments, and relied on Langella's Brief in the Appellate Division to set forth his claims.

> Neither *Gelbard* nor §2515 require the state court to quash a grand jury subpoena upon the speculation that the questions to be asked are derived from a tainted source. 408 U.S. at 60-61, 92 S. Ct. 2357. (16a)

The Court further stated:

> Although a federal district court may be required to follow the *Persico* [*] procedure, neither *Gelbard* nor federal statute requires that state courts observe a similar procedure. The state prosecutor's oral representation that electronic surveillance was employed, but conducted pursuant to court order, was constitutionally sufficient even if a different procedure would be required of federal prosecutors. (18a).

With respect to Langella's second claim, the District Court held that the same grand jury which heard Langella's responsive answer to "a meager number of questions" (20a), could properly consider the entire record of his appearance to determine "whether the questions were proper, and whether the witness acted with the requisite specific criminal intent" (20a).**

Although finding Langella's claims "wanting in merit," the Court granted a certificate of probable cause and continued the stay of Langella's surrender pending appeal (23a).†

* *In re Persico,* 491 F.2d 1156 (2d Cir.), *cert. denied,* 419 U.S. 924 (1974).

** With respect to Langella's third claim, the District Court held that, even if a grand jury witness has a constitutional right to consult counsel, Langella had had several conferences with his attorney during his grand jury appearance and was not denied that right (21a-22a).

† The District Court's opinion is reported at 413 F. Supp. 1214.

The Appeal to the Second Circuit

In the Second Circuit, Langella made two claims. Although the first claim related to the subject of electronic surveillance, it was very different from the claim Langella had pressed in the District Court (and in the state courts). He no longer asserted, as he had before, that at the time of his grand jury appearance, he was denied a judicial ruling on whether there had been illegal eavesdropping. Indeed, he explicitly stated that he was "leaving aside the difficult procedural questions concerning a witness' right to pre-testimony inquiry concerning electronic surveillance * * *." (Brief at 14). Instead, Langella asked the Second Circuit to reverse the denial of his habeas petition on the ground that his questioning in the grand jury was in fact based upon illegal electronic surveillance. Without any support in the record, it was asserted in Langella's brief that at a calendar appearance in the state court prior to Langella's plea of guilty on June 18, 1975, the prosecutor had "conceded, for the purposes of the [pretrial] motions, that the electronic surveillance, though pursuant to court order, *was unlawful*" (Brief at 13; emphasis in original). Langella's brief stated (at p. 13, n.) that counsel did "not have the minutes of this calendar appearance to include in the appendix but expects to have them before oral argument."*

In response, the State argued that Langella's new claim should not be considered because it had not been presented to the District Court or to the state courts.

* No such minutes were produced before or at oral argument on September 13, 1976, or afterwards, though the Court stated it would accept the minutes even after argument.

Langella's previous claim concerning the procedures followed at the time of his grand jury appearance was not briefed by either party because Langella had explicitly left that issue "aside."

In the Second Circuit, Langella raised a second issue which had been raised in the previous state and federal court proceedings—that his indictment by the same grand jury which heard his testimony violated his Fifth Amendment right against self-incrimination. The state responded to this claim on the merits.

In addition, as in the District Court, the State argued that none of the claims raised by Langella should be reviewed in a federal habeas corpus proceeding because Langella had pleaded guilty in state court.

On November 22, 1976, the Second Circuit affirmed the District Court's denial of the habeas petition. The Court's opinion first concluded that Langella's guilty plea did not prevent consideration of the merits of his claims (4a-5a). The Court then addressed the question, which Langella had expressly "[left] aside" and which had not been briefed, of whether the state had followed permissible procedures in its grand jury proceeding. The Court held that the procedures were permissible.

> The hearing here occurred before *Einhorn* which would today govern the procedure in the New York courts in a similar case. Justice Sandifer's denial of Langella's pre-appearance motion, on the prosecutor's assurance of the existence of a court order for the electronic surveillance, essentially meets the requirements of *Einhorn* and constitutes a sufficient accommodation of the needs of the grand jury with those of the witness. *Gelbard* v. *United States,* 408 U.S. 41, 70

(1972) (White, J., concurring). Moreover, Langella failed thereafter to make a timely request for further determination as to the source of the two questions which were the subject of the contempt indictment. * * * After consulting his lawyer, he persisted in evading answers, but not on any claim the questions were based on illegal surveillance. Later, after being asked about one Gorgone, a/k/a Black, he asked to see a judge to determine whether that question arose from illegal surveillance. Here there was a sufficient compliance with the requirements of *Einhorn* on the earlier motion, and nothing new was raised before the grand jury to require a new hearing as to the source of the particular questions the witness refused to answer, which refusal was the basis of the contempt conviction. (7a-8a).

The Court concluded that, although Langella had objected to the question about receiving messages from Gorgone, he did nothing to alert the grand jury or the prosecutor that his objection of illegal eavesdropping applied to the earlier questions which became the subject of his contempt indictment.

> When the grand jury asked Langella whether he had been receiving messages from Joseph Gorgone about the murder of Joseph Gallo, Langella, after consulting for the fourth time with his attorney, asked whether the question was based on electronic surveillance and requested that he be taken before a judge. His request was denied. Upon his continuing to be recalcitrant and to request that he be taken before a judge, he was excused by the grand jury. But the two questions for which Langella was held in contempt were asked earlier in the grand jury proceedings [31a, 40a, 43a, 46a, 47a, 49a-50a]. Although he had already consulted three times with his attorney, Langella never told the grand jury that his refusal to answer these two questions was based on his claim that they were the product of an illegal electronic surveillance. (6a-7a)

The Court did not discuss Langella's claim (the one he briefed) that the questions which were the basis for his contempt conviction were in fact based upon illegal electronic surveillance.

The Court also rejected Langella's claim that his rights under the Fifth Amendment were violated because the same grand jury which heard him testify also returned an indictment charging him with contempt. The Court thought it necessary for a grand jury considering contempt charges to know the extent of the witness' answers to questions and advantageous to observe the witness' demeanor in evaluating whether a refusal to answer was deliberate and contemptuous (8a-9a).

Subsequent Proceedings

On November 26, 1976, Langella filed a petition for rehearing in the Second Circuit, thereby obtaining, under Rule 41(a), Federal Rules of Appellate Procedure, an automatic stay of the issuance of the Second Circuit's mandate. Rehearing was requested to consider still another claim concededly not previously presented to the Second Circuit or considered by it (Petition for Rehearing, p. 5). The petition for rehearing was denied on December 1, 1976.*

---

* The claim in the petition for rehearing was the same as the fourth claim in Langella's pretrial motion—that during Langella's grand jury appearance he was not advised by the questioner of the scope of his immunity in jurisdictions other than New York, see above p. 6. Langella had withheld this claim from his direct appeal

(footnote continued on next page)

Langella then applied to the Second Circuit pursuant to Rule 41(b), FRAP, for a stay pending determination of a petition to be filed by Langella in this Court for a writ of certiorari. On December 21, 1976, the Second Circuit granted Langella's motion to stay issuance of its mandate pending application to this Court for a writ of certiorari. Under Rule 41(b), such a stay expires after thirty days. Langella did not file his petition for a writ of certiorari within thirty days, and the stay expired on January 20, 1977. On January 26, 1977, the mandate of the Second Circuit was issued. On January 27, the state court rejected Langella's contention that the mandate had been issued in error and that Langella had until March 1, 1977 to file his application to this Court and maintain the Second Circuit's stay. (March 1, 1977 was 90 days after his petition for

---

to the state courts, from his application to the federal district court, and from his appeal to the Second Circuit.

On December 6, 1976, Langella asserted this new claim in another federal habeas corpus petition, *Langella* v. *Supreme Court*, 76 Civ. 5415, and requested a "stay of all state court proceedings pending determination of this petition. * * *" (at p. 4). The State's motion to dismiss the petition for failure to exhaust state remedies was granted on December 15, 1976, in a memorandum (per FRANKEL, J.), which deemed "substantial" the State's "suggestion that petitioner may be 'manipulating the writ of habeas corpus in an effort to delay his surrender to State authorities' " (at p. 1).

Thereafter, Langella presented his new claim to the state courts in a post-conviction motion. Under state law, post-conviction motions like Langella's must be denied unless the movant asserts a reasonable justification for not having raised the claim on direct appeal. N.Y. C.P.L. §440.10(2)(c). This provision was called to defense counsel's attention by the District Attorney's Office and by the state judge before whom Langella's motion was made. Nevertheless, Langella refused to assert any justification for his failure to raise the claim on direct appeal. Instead, in the face of Judge Frankel's ruling to the contrary and in the face of what was demonstrable from the papers filed in the state courts, Langella claimed that he had in fact raised his new claim on direct appeal. Under another provision of New York law, CPL §440.10(2)(a), which was also called to defense counsel's attention, a post-conviction motion

(footnote continued on next page)

rehearing was denied on December 1, 1976.) Pursuant to the state court's order, Langella surrendered to state authorities and commenced serving his sentence.

The same day, January 27, 1977, Langella moved in the Second Circuit for a second stay pending filing of a petition for a writ of certiorari.*

On February 7, 1977, Langella filed the instant petition for a writ of certiorari. On February 8, 1977, the Second Circuit granted Langella's application for a second stay

---

must be denied if the same claim has been raised and rejected on the direct appeal. Langella, then, took a position which constrained the state court to reject his post-conviction motion without reaching the merits of his claim, and the state court so ruled. The Appellate Division denied leave to appeal.

Langella's maneuvers are part of a strategy to keep open the possibility of continuous federal litigation so that he can continue to seek stays of his surrender to state authorities. He withheld a claim until after the Second Circuit rejected his appeal from the denial of his first habeas corpus petition. When the stay of his surrender was about to expire, he asserted a new claim—first in a petition for rehearing and then in a second habeas corpus petition. On the basis of his second habeas corpus petition, he sought a further stay of his surrender although he had not exhausted state remedies. When his second habeas corpus petition was dismissed, he presented the new claim to the state courts in a manner calculated to ensure an immediate rejection. The state courts did reject the claim, and now Langella may return to federal court. Thus, Langella has maneuvered into a position, if this Court should deny the instant petition, to resubmit his federal habeas corpus petition and seek still another stay in the federal courts, where, as the history of this litigation shows, Langella has been successful in obtaining (even *ex parte*) stays of his surrender though his claims have been determined to be without merit.

* In support of this application for a stay, Petitioner's counsel claimed that he had "inadvertently" confused the 90-day period for filing the petition with the 30-day period of the stay granted December 21, 1976. However, counsel's application for the first stay had stated that the application to this Court would be made within 30 days, and the District Attorney's Office had also pointed out to Langella and his counsel that, under Rule 41(b), if Langella desired to continue his stay, he had to file in this Court within 30 days from December 21, 1976, when the first stay was granted.

pending disposition of his petition to this Court. Langella then applied to the District Court for a order terminating his incarceration, which was granted. Langella was released on February 10, 1977.

ARGUMENT

In this petition, Langella seeks to raise large issues concerning what procedures are imposed by federal law on state prosecutors and judges when a witness before a state grand jury refuses to answer, claiming that the questioning is based on illegal eavesdropping. Specifically, Langella contends that it is insufficient for a state prosecutor to respond to such a claim by stating that the eavesdropping was done pursuant to court order. Langella maintains that before a witness must answer questions, he is entitled to a more complete statement by the state prosecutor, under oath, and also a judicial ruling on whether questions are in fact based on illegal eavesdropping. If the state does not follow these procedures, according to Langella, the witness may not be charged with contempt for failing to answer the questions.

These issues should not be considered by this Court in this case because they were not briefed by either party below. In fact, Petitioner expressly left these issues aside in favor of the claim (not renewed in this petition) that the questioning was in fact based on illegal eavesdropping. Moreover, the record of the state grand jury proceeding does not adequately present the larger issues Petitioner seeks to raise.

Petitioner asks this Court to review a second claim—that his Fifth Amendment right against self-incrimination

was violated because he was indicted for contempt by the same grand jury which heard the testimony for which he had been given immunity. Again, the record of the state grand jury proceeding does not adequately present the issue Petitioner seeks to raise.

Finally, the Court should not grant the petition because, even if both claims were adequately presented, and even if they had merit, Petitioner would not be entitled to habeas relief because he pleaded guilty in state court.

I

The Court should not consider petitioner's claim relating to what is required by federal law when a witness in a state grand jury proceeding objects to questioning as based on illegal eavesdropping. This claim was not briefed below. Also, petitioner did not object to the questions which became the subject of his indictment for contempt.

This is not an appropriate case in which to consider what procedures are required by federal law when a witness before a state grand jury objects to questioning as based upon illegal eavesdropping. The issues concerning such requirements were not briefed in the Second Circuit because Petitioner "[left] aside" his claim concerning the procedures followed at the time of his grand jury appearance.

This Court should not consider issues like those raised by Petitioner unless they have already been subjected to thorough briefing and consideration. The need for thorough consideration below might be less clear if the issues raised by Petitioner had already been subjected to extensive litigation in the state and lower federal courts. In fact, however, other than in New York where the controlling case is

People v. *Einhorn, supra,* as far as we are aware, only Colorado has defined what procedures, if any, federal law imposes on state courts and prosecutors when a witness objects to questioning as based on illegal eavesdropping. *Westerberg* v. *District Court,* 506 P.2d 746 (1973), *cert. denied,* 414 U.S. 1162 (1975).*

Furthermore, the record of the state grand jury proceeding does not adequately present the issues Petitioner seeks to raise. The prosecutor's statement concerning electronic surveillance, which Petitioner urges this Court to find inadequate, was made in response to a motion to quash a grand jury subpoena. That motion was made before Petitioner had appeared in the grand jury or been asked any questions. At that stage, inquiry into the lawfulness of electronic surveillance was premature under New York and federal decisions. No statement by the prosecutor about electronic surveillance was required. *See People* v. *Einhorn, supra, Matter of Burns,* 50 A.D.2d 527 (1st Dept. 1975);** *In re*

* Since *Gelbard* v. *United States,* 408 U.S. 41 (1972), there have been several decisions concerning what a *federal* grand jury witness must do to "trigger" the *federal* prosecutor's obligation under 18 U.S.C. 3504(a)(1) to "affirm or deny the occurrence of the alleged unlawful act," and what a federal prosecutor must do to meet that obligation. *See, e.g., In re Millow,* 529 F. 2d 770 (2d Cir. 1976); *In re Santiago,* 533 F.2d 727, 729-730 (1st Cir. 1976); *In re Lochiatto,* 497 F. 2d 803 (1st Cir. 1974); *In re Grand Jury (Freedman),* 529 F. 2d 543, 549-550 (3rd Cir. 1976); *In re Berry,* 521 F.2d 179, 184-185 (10th Cir.), *cert. denied,* 423 U.S. 928 (1975). As stated in the District Court's opinion in this case (18a, n.4) and by the New York Court of Appeals in the *Einhorn case,* 35 N.Y. 2d at 949, n., Section 3504(a)(1) does not apply to proceedings in the state courts.

** *Burns* affirmed the denial of a motion to quash grand jury subpoenas "essentially for the reasons stated" by the court below. The lower court, in an opinion which is unreported, concluded that a subpoenee must appear in the grand jury and be questioned before he may object to questions as based on illegal eavesdropping and request to go before a judge for a ruling on his objection. The court did not permit the issue of illegal eavesdropping to be raised on a motion to quash a grand jury subpoena.

Mintzer, 511 F.2d 471, 472 (1st Cir. 1975). Accordingly, the denial of the motion to quash the subpoena was proper without regard to whether it was sufficient for the prosecutor simply to state that there had been court-ordered electronic surveillance.

After Langella's request for a judicial inquiry was denied as premature, he was ordered to appear before the grand jury. Even though the prosecutor had informed Langella and his counsel that there had been electronic eavesdropping, and even though Langella in fact made objection to one question at the end of his grand jury appearance, he did not object during his grand jury appearance to the two questions which became the subject of his contempt indictment. He categorically refused to answer these questions without objection of any kind. He certainly had sufficient opportunity to raise an objection because he did not refuse categorically to answer until after he had been asked these questions several times (31a, 40a, 43a, 46a, 47a, 49a-50a), and until after he had had three consultations with his attorney (27a, 32a, 49a).

The Second Circuit was clearly correct in determining that Petitioner failed to make a "timely request for further determination as to the source of the two questions which were the subject of the contempt indictment" (7a). Only long after he had categorically refused to answer these two questions (and not, as Petitioner says, in the "next round," Petition, p. 7) did Langella object to any question as based upon illegal electronic surveillance. When the objection was made, it was specifically directed to the entirely different question then being asked. Petitioner said: "Is

that question about [receiving messages from] Joseph Galgone [*sic*] based on electronic surveillance or wiretaps or bugs?" (66a). Petitioner added, "As of Joe Galgone [*sic*], he [my lawyer] wanted to know whether you have any wiretap, illegal device" (69a). There was nothing about what Langella said that could possibly have been taken as an objection to entirely different questions asked earlier in the proceedings. This is not a case, then, in which a grand jury witness, after being alerted by a later question that earlier questions he had refused to answer might have been based upon illegal electronic surveillance, seeks without success to object to those earlier questions.*

Thus, there is no occasion in this case to consider what the state prosecutor and court should have done if, instead of categorically refusing to answer the questions which became the subject of the indictment, Petitioner had given any indication that he was objecting to these questions as based upon illegal electronic surveillance.

* The Petition (p. 13), suggests that Langella did not object to the two questions about the Nyack apartment, which became the subject of his indictment, because he had no "clues" that he had been overheard until, after his refusal to answer those two questions, he was asked the question about receiving messages from Gorgone. What the Petition fails to point out is that the question about receiving messages from Gorgone was asked several times in the course of Langella's grand jury appearance without being objected to (47a, 59a, 60a, 62a, 65a), including once (47a) before he refused to answer the two questions about the Nyack apartment (49a-51a). In addition, Langella conferred with his attorney (48a) after being asked the question about Gorgone (47a) and before refusing to answer the two questions about the Nyack apartment for which he was indicted (49a-51a).

II

Petitioner's Fifth Amendment claim should not be considered because he gave no substantial testimony which could have been "used" by the grand jury to indict him.

Langella also claims that his Fifth Amendment right against self-incrimination was violated when he was indicted by the same grand jury before which he committed contempt. He maintains that the grand jury might have considered some of his answers and thus violated the prohibition on "use" of testimony for which he had been given immunity, *Kastigar* v. *United States,* 406 U.S. 441 (1972). Therefore, he maintains, he could be properly indicted only by another grand jury which was not aware of the answers he gave before the first grand jury.

As the Second Circuit noted, it is settled practice for the same grand jury which heard a witness testify to consider charges of perjury or contempt (8a). Moreover, there is a longstanding principle which permits testimony obtained under a grant of immunity to be used in a prosecution for perjury or contempt committed in the same proceeding in which the testimony was given, *see Glickstein* v. *United States,* 222 U.S. 139, 141-142 (1914), *Cameron* v. *United States,* 231 U.S. 710, 720-721 (1914), *United States* v. *Bryan,* 339 U.S. 323, 335-343 (1950), *Kastigar* v. *United States, supra.**

* The statute approved in *Kastigar* contained an exception which permitted use of compelled testimony "in a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order" to testify. 18 U.S.C. Sec. 6002, quoted in 406 U.S. at 448-449.

Petitioner's reliance on cases involving use of immunized testimony in prosecutions for substantive crimes is misplaced, as both the Circuit (9a, n.8) and District (21a) Courts pointed out.

If this court desires to review these established practices and principles, this is not a good case to do so because Petitioner gave no substantial testimony which could have been considered by the grand jury in deciding to indict him. As the District Court noted, Langella "answered responsively to a meager number of questions" (20a). He testified before the grand jury "that he was a professional gambler [34a], that he had not filed income tax returns for a number of years [33a],* and that he was a close friend of Alphonse Persico [66a], a person alleged to have been involved in the subject murder investigation" (20a-21a).**

Langella made his guilt of criminal contempt abundantly clear to the grand jury by his categorical refusal to answer the questions concerning his visit to the Nyack apartment (49a-51a), and also by his persistent unresponsiveness to questions throughout his appearance.† On this record,

*As the District Court noted, this information was volunteered in an unresponsive answer to the question of what Langella's occupation was (20a, n.5). Accordingly, there was no immunity with respect to this testimony. N.Y. CPL Sec. 190.40.

** Langella also denied that he had planned the killing of Joseph Gallo, that he had spoken afterwards with Carmine DiBiase or Joseph Yacovelli (49a), and that he had discussed the murder of Gallo with Persico inside the Nyack apartment (52a-53a).

† At the outset, when asked his occupation, Langella at first said "I have to ask my lawyer that" (26a), then claimed on the same page of the record that "now I forgot the question" (26a). Although immunity had already been adequately explained by the prosecutor to Langella's stated satisfaction (*see* 24a-25a), and Langella had conferred with his attorney before (25a, 28a) and again during his grand jury appearance (27a), Langella still did not answer the question about his occupation, but instead himself asked questions about immunity (27a-29a).

Although immunity was again explained to Langella (29a-30a), he still did not answer the question about his occupation and claimed he had not even discussed it with his attorney during the conference

(*footnote continued on next page*)

there is only a remote and imaginary possibility that Langella's meager responsive answers were "used" by the grand jury in considering whether to indict him.*

III

Langella's claims should not be considered because he pleaded guilty in state court.

Federal habeas corpus relief is not generally available to a defendant like Petitioner whose conviction is based upon his plea of guilty in state court. *See Tollett* v. *Henderson,* 411 U.S. 258 (1973). There are two exceptions to this principle. First, where state law permits a claim to be reviewed on appeal even after a guilty plea, federal habeas review is available. *Lefkowitz* v. *Newsome,* 420

(29a-30a). Langella continued to refuse to answer questions (30a-32a) and, after yet another conference with his attorney (32a), asked more questions about immunity (33a). Langella persisted in being unresponsive (33a-48a), claiming that he had a right to talk to his lawyer after each question was asked (31a, 32a, 36a, 39a-40a, 44a-45a; *see also* 53a, 59a, 60a-61a). Langella also stated on several occasions that he had "cards" from his lawyer (28a, 33a, 49a, 54a, 66a), which he sometimes termed the "wrong card" (49a, 54a).

When excused to talk to his attorney for the third time, Langella laughed (48a) and claimed he "forgot" what to ask his lawyer about (48a). Langella then answered certain questions (49a), but refused to answer the two questions which became the subject of his indictment, as well as other questions (49a-51a). Thereafter, Langella repeatedly asked to consult with his attorney (51a-61a), again claiming that he "forgot" the question (52a, 53a, 62a).

* Petitioner incorrectly asserts that the state "conceded" that Langella's responsive answers were "used" by the grand jury in considering his indictment. What the state contended—and the Circuit (8a-9a) and District (20a) Courts agreed—is that the grand jury could properly consider the entire record of Langella's grand jury appearance, much of which was evasive, and Langella's demeanor, in determining whether his refusal to answer the questions concerning the Nyack's apartment was deliberate and contemptuous.

U.S. 283 (1975). New York's CPL §710.70(2), the provision at issue in *Newsome,* does permit appellate review of a motion to suppress evidence after a guilty plea. The two claims which Petitioner seeks to raise here, however, relate to procedure at the time of his grand jury appearance and to his indictment by the same grand jury which heard him testify. Such claims are not cognizable in a motion to suppress evidence, and Petitioner in fact made no such motion but presented his claims in a pretrial motion for dismissal. Under state law, the claims made in Petitioner's pretrial motion are not reviewable on appeal after a guilty plea. Accordingly, contrary to the conclusion reached by the courts below, these claims are not cognizable in a federal habeas corpus proceeding under the doctrine of *Lefkowitz* v. *Newsome, supra.**

Second, review is permitted of claims which, in their nature (like double jeopardy claims), would prevent defendants from even being brought into court, *see Menna* v. *New York,* 423 U.S. 61 (1975) (per curiam), *Blackledge* v. *Perry,* 417 U.S. 21, 30-31 (1974). Petitioner's claims constitute, at most, defenses to contempt charges. Neither claim, even if meritorious, would prevent him from being haled into court. Indeed, Langella's Fifth Amendment claim, if accepted, would by its terms not preclude his re-indictment by a different grand jury which was not privy to all his testimony.

* To support the conclusion that petitioner's claims were reviewable, the courts below referred to New York's provisions permitting the *trial court* to consider claims like petitioner's after a guilty plea for good cause shown (5a, 15a). However, unlike N.Y. C.P.L. §710.70(2), at issue in *Newsome,* the provisions relied upon by the courts below do not provide for appellate review of claims after a guilty plea.

Accordingly, Petitioner's claims do not entitle him to federal habeas relief from a state court conviction based upon his plea of guilty. Since Petitioner is not entitled to relief upon the claims he has presented, review of those claims should not be granted.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ROBERT M. MORGENTHAU
District Attorney
New York County

PETER L. ZIMROTH
HENRY J. STEINGLASS
Assistant District Attorneys
Of Counsel

April, 1977